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No. 08-978

IN THE

Supreme Court of the United States

PAUL HENDLEY and THE CITY OF WAUKEGAN,

Petitioners,

v.

S. ALEJANDRO DOMINGUEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Maryland v. Baldwin*, 112 U.S. 490 (1884), requires vacatur of a general verdict when both the district court and the court of appeals concluded that every theory of liability presented to the jury was amply supported by trial evidence.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

A. Petitioners Forfeited Their *Baldwin* Argument By Failing To Raise It Until Their Reply Brief On Appeal 9

B. The Seventh Circuit's Opinion Does Not Conflict With Any Opinion Of This Court Or Any Other Court Of Appeals 13

C. This Case Presents An Unusually Poor Vehicle For A Reexamination Of The *Baldwin* Principle 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 10

Atl. City Police Dep't v. Hurley,
No. 99-431 (cert. denied Jan. 10, 2000) 21

Boyers v. Texaco Ref. & Mktg.,
848 F.2d 809 (7th Cir. 1988) 10

Brady v. Maryland,
373 U.S. 83 (1963) 6

Braun v. Flynt,
731 F.2d 1205 (5th Cir. 1984) 25

Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998) 19

Clingman v. Beaver,
544 U.S. 581 (2005) 9, 12

Collum v. Butler,
421 F.2d 1257 (7th Cir. 1970) 19

Cooper Indus., Inc. v. Aviall Servs., Inc.,
543 U.S. 157 (2004) 10

Davis v. Rennie,
264 F.3d 86 (1st Cir. 2001) 19, 20

Dawson v. N.Y. Life Ins. Co.,
135 F.3d 1158 (7th Cir. 1998) 21

E.I. du Pont de Nemours & Co. v. Berkley & Co., 620 F.2d 1247 (8th Cir. 1980) 20

Ernst & Young LLP v. Knapp,
No. 96-886 (cert. denied Feb. 18, 1997) 21

Estate of Phillips v. City of Milwaukee,
123 F.3d 586 (7th Cir. 1997).....11, 12

Gillespie v. Sears, Roebuck & Co.,
386 F.3d 21 (1st Cir. 2004).....25

Henderson v. Winston,
No. 94-2071, 1995 WL 378602
(4th Cir. June 27, 1995).....19

Hurley v. Atl. City Police Dep't,
174 F.3d 95 (3d Cir. 1998).....19, 20

Kamen v. Kemper Fin. Servs., Inc.,
500 U.S. 90 (1991).....11

Kossman v. Ne. Ill. Reg'l Commuter R.R. Corp., 211 F.3d 1031 (7th Cir. 2000).....22

Lab. Corp. of Am. Holdings v. Metabolite Labs., 548 U.S. 124 (2006).....23

Lawndale Nat'l Bank v. Am. Cas. Co.,
489 F.2d 1384 (7th Cir. 1973).....20, 21

Maryland v. Baldwin,
112 U.S. 490 (1884).....6, 7

McCord v. Maguire,
873 F.2d 1271 (9th Cir. 1989).....22

Mitsubishi Elec. Corp. v. Ampex Corp.,
190 F.3d 1300 (Fed. Cir. 1999).....22

Mitsubishi Elec. Corp. v. Ampex Corp.,
No. 99-1287 (cert. denied Apr. 3, 2000).....21

Mueller v. Hubbard Milling Co.,
573 F.2d 1029 (8th Cir. 1978).....19

Muth v. Ford Motor Co.,
461 F.3d 557 (5th Cir. 2006).....19

Regions Bank v. BMW N. Am., Inc.,
No. 05-375 (cert. denied Nov. 28, 2005) 21

Simmons, Inc. v. Pinkerton's, Inc.,
762 F.2d 591 (7th Cir. 1985).....22

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993).....13, 15

Textile Banking Co. v. Rentschler,
657 F.2d 844 (7th Cir. 1981).....10

Transp. Ins. Brokers, Inc. v. D.W. Ferguson & Assocs., No. 94-2113 (cert. denied Oct. 2, 1995) 21

Traver v. Meshriy,
627 F.2d 934 (9th Cir. 1980).....19

Union Pac. R.R. Co. v. Barber,
No. 04-47 (cert. denied Oct. 12, 2004).....21

United States v. Bagley,
473 U.S. 667 (1985).....15

United States v. Bestfoods,
524 U.S. 51 (1998).....23

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006).....11

Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502 (7th Cir. 1994).....12

Wilmington Star Mining Co. v. Fulton,
205 U.S. 60 (1907).....15, 20

STATUTES

28 U.S.C. § 1254(1).....1

42 U.S.C. § 1983 4

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 545 F.3d 585. The order of the district court denying petitioners' motion for judgment as a matter of law or for a new trial (Pet. App. 20-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2008. A petition for rehearing was denied on October 31, 2008. The petition for a writ of certiorari was filed on January 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 1989, respondent, then age 15, was wrongfully accused of sexual assault in Waukegan, Illinois. Petitioner Paul Hendley, a police officer for the City of Waukegan, was in charge of, and responsible for, the investigation into the alleged crime reported by the victim, Lisa Kraus. Kraus described her alleged attacker as a gang member and an English speaker, neither of which describes respondent. Tr. 190, 411, 515, 618, 632, 662, 708-09. She also gave Hendley a physical description of her attacker, which differed from respondent in height, age, clothing, and hair style. Tr. 575, 621-24, 845, 1001-02. After the security guard at the apartment complex heard rumors that respondent had been "involved in an altercation," he brought respondent to the security office as a "possible suspect." Tr. 616, 637-38.

To identify Kraus's attacker, Hendley conducted a showup procedure, which involved setting up a situation where Kraus could view respondent alone (*i.e.*, instead of as part of a lineup), and asking if he was the attacker. Kraus testified that Hendley walked her past the security office, where respondent was sitting, to "ID the person they had in custody," and that Hendley told her that her "friend had pointed him out as the one that had committed the crime." Tr. 531-32. Kraus testified that, after 40 seconds of looking at respondent, she was able to "identify" him. Tr. 554. Both before and after the showup, Hendley showed Kraus pictures of respondent, further undermining the reliability of her identification. Tr. 542-45. Hendley did not inform the prosecutor or respondent's defense team of any of the key facts surrounding Kraus's identification of respondent as her attacker. Tr. 689, 1431-32, 1444-46. Nor did he inform them of the fact of or the result of a live lineup that Hendley subsequently conducted for Kraus. Tr. 558. Most of the foregoing was not known to respondent until discovery in this civil case, many years after respondent's sentence had already been completed.

In the course of Hendley's original investigation, he uncovered a wealth of exculpatory information, all of which he also failed to disclose. Just three days before the alleged rape, Kraus reported to the Waukegan Police Department another sexual assault. Tr. 606; SR13. Although a police report would have been prepared for this complaint, no such report appears in the file or was provided to the defense. Tr. 606-07. Kraus's statement to the police that the perpetrator of the second alleged rape (the one for which respondent was convicted) lived in Apartment 309 similarly would have been exculpatory, since respon-

dent did not live or spend time in that apartment. This statement, too, is missing from the police reports, and was only discovered by respondent long after his conviction. Tr. 867-68, 1453-54. Hendley also failed to submit to the Illinois Crime Lab relevant evidence swabs that were included in the rape kit. Perhaps most compellingly, Hendley received but failed to disclose the so-called "Navy Report," which included an account that Kraus gave to a Navy hospital about the alleged rape that contradicted Kraus's later testimony. Tr. 1447. Neither the prosecution nor the defense at the criminal trial had access to these highly relevant (and exculpatory) reports. Tr. 1447-48.

At respondent's bench trial on the rape charge, Kraus's identification of respondent was the principal evidence against him. Tr. 1457-58. Although Kraus had claimed to have bitten her attacker, respondent lacked any bite marks, and lab results undermined Kraus's claim to have scratched her attacker because she had no cellular material under her fingernails. The prosecution offered the testimony of Kraus's treating doctor and a forensic serologist, who testified that evidence collected from Kraus's underwear was consistent with 1/3 of the men in the United States, including respondent. The defense presented alibi testimony, which was apparently disbelieved by the trial judge. Because the defense lacked access to any of the exculpatory evidence described above, none of that evidence was presented at trial. Respondent was convicted of criminal sexual assault. SR145.

In 2001, DNA evidence proved that respondent (by then age 27) was not Kraus's rapist, and his conviction subsequently was vacated. On August 4, 2005, the Governor granted respondent a pardon

specifically based on innocence. The State's Attorneys' Office did not object either to the vacatur of the conviction or the pardon.

2. On April 23, 2004, respondent filed a complaint under 42 U.S.C. § 1983 against the City of Waukegan and the police officers involved in the investigation of the alleged rape, including Hendley, the lead detective. The case ultimately went to trial against the City of Waukegan and Hendley alone. The sole claim submitted to the jury was that Hendley violated respondent's right to due process by subverting his criminal trial.

Respondent offered three theories in support of the claim that he was deprived of due process, and presented substantial evidence in support of each theory. Specifically, respondent offered details of the showup procedure, coupled with expert testimony--confirmed by the testimony of Hendley himself and his own expert—that a lineup should have been used instead of a showup. Tr. 314-16, 516-17, 639-40, 742-45, 833-35, 843, 1469-70, 1552. All of the witnesses (including the defense witnesses) agreed that a showup under these circumstances would be unduly suggestive, creating a risk of misidentification; the only dispute was whether Hendley had intentionally employed the suggestive procedure, which Hendley denied but Kraus confirmed. *Id.*

Respondent also offered evidence that Hendley had withheld from the prosecution and the defense the substantial, potentially exculpatory evidence detailed above.

Finally, respondent offered evidence that Hendley had manipulated evidence, preparing police reports that obscured the nature of the showup, the true circumstances of the identification, and possibly

the true nature of Kraus's identification of the driver of a TransAm relevant to the crime.

Testifying in his defense at the civil trial, Hendley denied that he had orchestrated any showup identification, and further denied that he had withheld material, exculpatory evidence or falsified his police reports.

To resolve these questions of fact, which turned in large part on witness credibility, the parties agreed on a general verdict form, which would require the jury to resolve only the single question of whether Hendley's conduct deprived respondent of due process. By agreement, the court instructed the jury to find in favor of respondent if he proved that Hendley "caus[ed] a situation where no fair trial of Dominguez could take place" in any of three ways: (1) by "us[ing] an unnecessarily suggestive identification procedure that resulted in an unreliable identification"; (2) by "creat[ing] false evidence or statements pointing to Dominguez' alleged guilt by means of improper coercion, manipulation and/or outright fabrication"; or (3) by "withh[olding] material evidence pointing to Dominguez' innocence from prosecutors, judge and defense counsel." Appellee's C.A. App. 1. No special interrogatories were sought by the defense, or given by the court.

The jury returned a verdict in favor of respondent. Hendley filed a timely post-trial motion seeking judgment as a matter of law or a new trial. In support of his argument for judgment, Hendley asserted various alleged legal defects in respondent's due process claim and also urged, in summary fashion, that respondent had insufficiently pled and supported his allegation that Hendley had withheld material exculpatory evidence. Hendley also sought

a new trial on the basis of allegedly prejudicial jury instructions and evidentiary decisions by the district court, as well as his contention that the verdict was against the weight of the evidence. The district court denied Hendley's motion in its entirety, noting that "it's frankly difficult for me to conceive[] of arguments . . . more empty in merit than those advanced here." Appellee's C.A. App. 8.

3. On appeal, now represented by new counsel, petitioners raised an array of challenges to the verdict (many of them new), including challenges to the finding of impropriety in the identification procedures, as well as to the sufficiency of the evidence supporting the allegations that Hendley had withheld and manipulated evidence. After respondent answered these arguments in his response brief, petitioners shifted course. In their reply brief, they for the first time characterized the verdict not as reflecting that the jury found at least one of three potential due process violations, but as indicating that the jury found at least one of *eleven* potential violations. C.A. Reply Br. 2, 18. Petitioners apparently reached this number by counting as a separate theory of liability each piece of evidence that respondent's counsel discussed in his closing argument as arguably having been unlawfully withheld from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 19. Although Hendley had agreed on the instruction submitting the *Brady* theory to the jury and never objected to any of respondent's arguments with respect to that theory, in their reply brief to the Seventh Circuit, petitioners newly contended that seven of the nine *Brady* "theories" were insufficiently supported by evidence. Petitioners then relied on *Maryland v. Baldwin*, 112 U.S. 490 (1884), to argue that if respondent failed to prove any one of the

Brady-related allegations mentioned during the trial, petitioners would be entitled to reversal of the verdict. *See* C.A. Reply Br. 1-2, 18 (citing *Baldwin*, 112 U.S. at 490). After oral argument, the Seventh Circuit permitted respondent to reply to this new argument through supplemental briefing.

The Seventh Circuit affirmed the jury's verdict in its entirety. In so doing, the court found sufficient evidence to support the two due process theories that petitioners challenged as insufficiently supported.[1] With respect to respondent's claim that Hendley manipulated evidence, the Seventh Circuit found that "Hendley engaged in post-arrest conduct (like manipulation of evidence) that deprived Dominguez of a fair trial." Pet. App. 11; *see also id.* at 4 ("Dominguez has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial."). With respect to respondent's *Brady* theory, the Seventh Circuit concluded that the "trial record simply does not support" a conclusion that respondent failed to offer sufficient evidence to prove a violation of due process through a *Brady* violation, citing as examples Hendley's failure to disclose the showup and the Navy Report. Pet. App. 8-9.

Petitioners filed a petition for rehearing, focusing principally on their *Baldwin* argument. Though, but for the *Baldwin* principle, the court of appeals need not have reached petitioners' sufficiency arguments at all (because sufficiency with respect to the

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[1] Petitioners did not assert that there was insufficient evidence to support the claim that Hendley manufactured an unduly suggestive "showup."

"showup" theory was not disputed and would have sufficed to uphold the verdict), petitioners nonetheless criticized the panel for not addressing their *Baldwin* argument explicitly. The Seventh Circuit denied the petition without discussion or noted dissent.

REASONS FOR DENYING THE PETITION

Petitioners contend that because the Seventh Circuit's opinion specifically referenced only two of the nine pieces of unlawfully withheld evidence referenced by respondent's counsel during closing argument, there must not have been sufficient evidence to support respondent's arguments with respect to the seven pieces of evidence the Seventh Circuit did not mention. Although the agreed-upon jury instructions referenced not nine distinct *Brady* theories, but a single such theory—instructing the jury to find for respondent if Officer Hendley "withheld material evidence pointing to Dominguez's innocence" (Appellee's C.A. App. 1)—petitioners argue that this Court's decision in *Baldwin* requires a reviewing court to presume that the jury evaluating that single theory of relief relied upon assertedly unsupported factual allegations of unlawful withholding of evidence rather than the allegations that were amply supported by the trial record. Even assuming that *Baldwin* imposes on reviewing courts precisely the presumption that petitioners contend—and it certainly does not—their petition would amount, at most, to an assertion that the court of appeals erred in applying this Court's clearly established precedent in a case that has no importance beyond the parties to this litigation. Even when it contributes to some disharmony in the lower courts,

such a case ordinarily does not warrant this Court's review.

For at least three reasons, however, review of this case is particularly unwarranted. First, petitioners forfeited the argument upon which they now rely by failing to raise it either in their post-verdict motions in the district court or their opening brief on appeal. Second, the *Baldwin* line of cases, which generally requires vacatur of a general verdict when the reviewing court concludes that one of the theories on which the verdict might have rested is erroneous or insufficiently supported by evidence, is not remotely implicated either by the decision of the court of appeals, which found sufficient evidence to support each of the three due process theories presented to the jury, or the trial record, which contains ample evidence to support even the arguments of counsel concerning unlawfully withheld evidence on which petitioners now belatedly stake their case. Finally, to the extent there remain open questions concerning the proper application of *Baldwin* (though petitioner's portrayal of the confusion purportedly pervading the courts of appeals is grossly overstated), this case is a particularly unsuitable vehicle for resolving those questions because it would require the Court to undertake an extensive review of the trial record and to resolve multiple threshold issues of fact in order to determine whether the *Baldwin* principle is even implicated.

A. Petitioners Forfeited Their *Baldwin* Argument By Failing To Raise It Until Their Reply Brief On Appeal

It is well-settled that this Court does not review issues that were neither raised nor decided in the court of appeals. *Clingman v. Beaver*, 544 U.S. 581,

598 (2005); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Questions reviewed by this Court generally first require "full consideration by the courts below" in order to facilitate this Court's own consideration of those issues against a fully developed factual and legal record. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004).

The Question Presented by petitioners is not properly before this Court because petitioners failed to raise their *Baldwin* argument before the district court, and the argument therefore was not considered either by that court or by the Seventh Circuit, which, under circuit precedent, declines to reach arguments raised for the first time on appeal. *Boyers v. Texaco Ref. & Mktg.*, 848 F.2d 809, 811-12 (7th Cir. 1988) (quoting *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 853 (7th Cir. 1981)).

In Hendley's post-trial motion, where he should properly have raised this argument to preserve it for review in the court of appeals and in this Court, he instead argued that two of respondent's three legal theories—namely, that the showup was unduly suggestive and unreliable and that Hendley violated *Brady* by withholding material exculpatory evidence—failed because respondent did not submit evidence sufficient to make a prima facie case of a due process violation, or because they were against the weight of the evidence.[2] The post-trial motion never argued that a failure of proof on the *Brady* theory alone—much less on a single factual argument in support of the *Brady* theory—required

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[2] In his post-trial motion, Hendley did not challenge the evidence in support of respondent's theory that he fabricated evidence.

vacatur of the jury verdict. Moreover, Hendley's post-trial motion did not cite *Baldwin* or any of the cases following *Baldwin* on which petitioners now rely.

As with any challenge to evidentiary sufficiency, petitioners' argument as it is now framed—that the jury was presented with insufficient evidence with respect to one or more factual averments made in support of liability, and that the jury may have relied on those assertedly unsupported averments—"calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006). The district court, which denied Hendley's post-trial motion in its entirety, was given no opportunity to exercise that judgment as to petitioners' *Baldwin* argument that even a single insufficiently supported *Brady* assertion would require reversal of the entire verdict. The Seventh Circuit therefore could not properly consider petitioners' *Baldwin* argument, and nor can this Court.

Moreover, there is another, independent source of waiver. Not only did petitioners fail to raise their *Baldwin* argument before the district court, but they also failed to raise it in their opening brief filed in the court of appeals, and thus the issue was not addressed by that court. It is well-established in the Seventh Circuit that "all arguments for reversal must appear in the opening brief, so that the appellee may address them." *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997) (citations omitted); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 100 n.5 (1991) ("We do not mean to suggest that a court of appeals should not treat an

unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments."). Yet, just like Hendley's post-verdict motion in the district court, petitioners' opening brief failed to make any mention of their *Baldwin* argument, and instead simply challenged (unsuccessfully) all of respondent's due process theories. Accordingly, the Seventh Circuit had no opportunity to resolve the *Baldwin* question raised by petitioners, and the issue therefore is not properly before this Court.

Petitioners' assertion of the *Baldwin* argument for the first time in their reply brief was insufficient to raise the issue below or to preserve the argument for review in this Court. *Clingman*, 544 U.S. at 598. Under Seventh Circuit precedent, "'[a]rguments raised for the first time in the reply brief are waived.'" *Estate of Phillips*, 123 F.3d at 597 (quoting *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n.5 (7th Cir. 1994)). Petitioners attempted at that time to connect their belated reliance on *Baldwin* to their characterization—without citation—of respondent's brief as arguing that "the jury must have agreed with every argument and allegation of 'fact' he asserted at trial and rejected all of Appellants' defenses." C.A. Reply Br. 1. In circumstances similar to this case, however, the Seventh Circuit specifically rejects attempts by appellants to justify an entirely new argument based on the theory that the appellant was merely replying to an argument raised in the opposition brief. *Estate of Phillips*, 123 F.3d at 597 ("The [appellees'] perfunctory paragraph remarking that they thought the district court correct in disposing of the state law

claims is not enough to put those claims back into play on appeal.").[3]

In light of petitioners' clear forfeiture of the *Baldwin* argument, the Seventh Circuit's purported "fail[ure] to cite or apply the *Baldwin* principle" is not fairly characterized as the product of an "erroneous[] assum[ption] that the general verdict could stand as long as the record provided support for some of Dominguez's trial theories," Pet. 7, but rather reflects adherence to the Seventh Circuit's own well-established and entirely permissible practice of declining to consider arguments raised for the first time in a reply brief on appeal. Because the Question Presented was neither properly raised nor explicitly decided by the court of appeals, further review of that question is not appropriate.

B. The Seventh Circuit's Opinion Does Not Conflict With Any Opinion Of This Court Or Any Other Court Of Appeals

1. Petitioners claim that the decision below conflicts with a long line of decisions of this Court beginning with *Baldwin* and running through *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). Those cases stand for the uncontroversial proposition that a general verdict must be reversed if the reviewing court concludes that there is error in

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[3] The Seventh Circuit's authorization of supplemental briefs on the issue does not cure petitioners' waiver of their *Baldwin* argument. If anything, it proves respondent's point. The authorization of respondent to file a supplemental brief to reply to petitioners' belatedly raised *Baldwin* argument was necessary precisely because respondent's lack of an earlier opportunity to reply to that argument led to respondent citing responsive cases for the first time at oral argument.

one of the theories on which that general verdict potentially rests. Petitioners claim that the Seventh Circuit contravened this "*Baldwin* principle" in that it failed to review "each of the eleven theories [respondent] presented to the jury" and affirmed the jury verdict even though it found sufficient evidence to support only "two out of nine" *Brady* claims, and that (supposedly) no evidence existed "to support the other seven theories." Pet. 13, 14.

This characterization of the Seventh Circuit's decision rests on petitioners' mischaracterization of the trial proceedings. Respondent did not present eleven theories of liability to the jury. As the jury instructions make clear, he alleged that Hendley caused respondent's unfair trial through *three* courses of conduct: (1) improperly suggestive identification procedures; (2) fabrication of evidence; and (3) withholding material exculpatory evidence. The Seventh Circuit found evidence to support each of these three potential bases for the jury's conclusion that Hendley had violated respondent's due process rights. *See* Pet. App. 7 (orchestrating showup); *id.* at 4, 11 (manipulation of evidence); *id.* at 8-9 (failure to disclose exculpatory evidence).

In attempting to bring their case within the orbit of the *Baldwin* principle, petitioners argue that respondent's third theory of liability—that Hendley caused an unfair trial by withholding material exculpatory evidence—actually comprised nine separate theories: one for each piece of withheld evidence discussed in respondent's closing argument. This, of course, reflects a profound misunderstanding of respondent's *Brady* theory of liability. Respondent alleged not simply that Hendley had withheld particular pieces of evidence, but rather that the evidence withheld from him, in the aggregate, was so

materially exculpatory that Hendley's concealment of it denied respondent a fair trial. *E.g.*, *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Indeed, petitioners' argument that respondent was required to prevail on every separate argument about every piece of allegedly withheld, allegedly exculpatory evidence is nonsensical. As the agreed-upon jury instruction properly provided, all respondent was required to prove was that there was enough evidence in the record for the jury to reasonably conclude that Hendley withheld enough *Brady* material to support a constitutional violation. Appellee's C.A. App. 1. Petitioners, however, advance a view of the *Baldwin* principle that requires not only that there be sufficient evidence to support each theory of liability on which the jury could have rested its verdict, but also that there be sufficient evidence to support each argument of counsel in support of those theories, as well as each factual averment proffered at trial to support each of those arguments.

That overly expansive view of *Baldwin* finds no support in this Court's precedents; indeed, petitioners identify no court that has ever read *Baldwin* so broadly. To the contrary, each of this Court's cases applying *Baldwin* involves a situation where the potential theories of liability were pled or specifically outlined in the jury instructions. *See*, *e.g.*, *Spectrum Sports*, 506 U.S. at 451 (reversing verdict where verdict sheet charged defendants with "monopolizing, attempting to monopolize, and/or conspiring to monopolize," and jury was erroneously instructed with respect to the requirements to prove attempted monopolization); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907) (reversing general verdict for plaintiffs because eight acts of negligence were set

out in distinct counts, and three of those counts were unsupported by evidence).

In any event, petitioners' argument fails even on its own terms, as there was sufficient evidence to support each of the nine *Brady* examples offered by respondent at trial.

The first three examples of *Brady* material involved the withholding of evidence related to Kraus's showup identification of respondent; specifically, Kraus testified in support of respondent's claims (1) that Hendley withheld from respondent information that Kraus was shown a photograph of respondent *before* the showup; (2) that Hendley withheld information that Kraus's "identification" was improperly reinforced when she was shown a photograph of respondent *after* the showup; and (3) that Hendley withheld information about the nature of the showup itself, including that the identification was an arranged procedure rather than being spontaneous. *See* Appellee's C.A. Br. 22-24. Even when they finally advanced their *Baldwin* argument in their reply brief in the court of appeals, petitioners did not dispute that there was sufficient evidence—*e.g.*, Kraus's testimony—to support these assertions.

The next four pieces of exculpatory evidence referenced by respondent's counsel were police reports from the Waukegan Police Department either withheld by Hendley from the defense or not completed so as to prevent the disclosure of exculpatory information. Appellee's C.A. Br. 24-26 (citing trial evidence). One of these reports recounted Kraus's allegations of another sexual assault just three days before the sexual assault for which respondent was convicted. A Navy investigator testified that Hendley had told him about the previous allegation of sexual assault,

and Hendley agreed that such an allegation would normally give rise to a report. Another missing police report included the information Hendley discovered about Apartment 309, where Kraus claimed the perpetrators lived, and to which respondent had no connection. Hendley never documented this information. Other missing police reports included one reflecting an interview with Steve Sharp, a friend of Kraus's, and one reflecting an interview with Rich McCandless, the apartment security guard. Appellants' C.A. Br. 29-30.

The eighth *Brady* violation referenced by counsel was Hendley's failure to tell respondent of the exculpatory results of a live lineup that Hendley arranged. Although Hendley denied it at trial, Kraus testified to the existence of this lineup. Appellants' C.A. Br. 30; Appellee's C.A. Br. 26. And finally, there was Hendley's failure to submit certain missing evidence to the Illinois Crime Lab; the Crime Lab testified that this evidence was never provided, and Hendley was the person responsible for producing the evidence. *Id.* at 27.[4]

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[4] With respect to the missing Crime Lab evidence, petitioners continue to rely on evidence that is not even in the record. Indeed, the district court repeatedly denied petitioners' requests to supplement the appellate record to include this evidence. *See* C.A. Rule to Show Cause Exs. A-C. Petitioners' persistent requests to supplement the record elicited a strong rebuke from the district court judge, who remarked that "I have never seen anything quite like this, and I have been at this trade a long time." *Id.* Ex. D; *see also id.* ("And I still haven't heard an answer to the question of when the Court orders you to do something [compile the record for transmittal without including evidence that the court declined to certify], you have the gall to say, 'We won't do it.' . . . You have got a responsibility to the court. How can you come in and say, 'Judge, we are going to

There thus was adequate evidence to support each of the nine alleged *Brady* violations highlighted by respondent's counsel in his closing argument in support of respondent's single *Brady* claim. When coupled with Hendley's failure, noted by the Seventh Circuit (Pet. App. 8-9), to produce the so-called Navy Report, which recounted several potentially exculpatory statements made by Kraus at the Navy hospital after the alleged assault, it amounts to an undeniably compelling case that Hendley's withholding of evidence denied respondent a fair trial. Because respondent's *Brady* theory of liability—whether viewed as a single unitary theory, or even as nine separate theories for that matter—was well-supported by the evidence adduced at trial, the Seventh Circuit's affirmance of the jury verdict did not implicate, much less conflict with, *Baldwin*.

2. Nor does the decision below conflict with any decision of any other court of appeals. In fact, petitioners do not even assert the existence of such a conflict, arguing instead that this Court's review is warranted to resolve what they characterize as the Seventh Circuit's "internally inconsistent" approach to the *Baldwin* principle, and to resolve the approaches of other courts of appeals that, "just like the Seventh Circuit," have supposedly developed approaches that also are "internally inconsistent." Pet.

[Footnote continued from previous page]
thumb our nose at you?'"). Notwithstanding the district court's explicit refusal to supplement the record, petitioners proceeded to rely on that extra-record evidence in their appellate brief in an attempt to respond to one of the arguments in support of the *Brady* claim. *Id.* The petition for certiorari repeats the same argument, without acknowledging that the district court denied petitioners' motion to supplement the record with this evidence.

15, 19-20. Of course, this Court does not often grant certiorari to resolve intra-circuit conflicts; that is the job of courts of appeals sitting en banc. But, regardless, the approaches developed by the courts of appeals are not nearly as "internally inconsistent" as petitioners suggest.

The courts of appeals agree, as they must, that *Baldwin* is the governing law, and generally apply its rule. At least eight of the courts of appeals recognize the *Baldwin* principle, but apply a harmless error exception.[5] Petitioners claim that the cases that apply a harmless error exception are in conflict with cases that invoke the *Baldwin* principle without stating explicitly whether a harmless error exception exists. If this wrinkle in the case law reflected an inconsistency in the application of *Baldwin*, it would be of no consequence in this case since the court below did not need to resort to harmless error analysis. But, in fact, petitioners' claim of widespread intra-circuit conflicts between cases that follow *Baldwin* and those that apply a harmless error standard is greatly exaggerated. The two sets of cases are easily reconcilable. In many of the cases that petitioners

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[5] *See, e.g.*, *Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 (5th Cir. 2006); *Henderson v. Winston*, No. 94-2071, 1995 WL 378602 (4th Cir. June 27, 1995); *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001); *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1999); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (Kennedy, J.) (applying a multi-factor test to determine when a reviewing court may properly construe a general verdict as attributable to a properly submitted theory); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970).

claim "applied *Baldwin* correctly," the error is plainly not harmless, or for some other reason the issue is simply not addressed. *See, e.g.*, *Lawndale Nat'l Bank v. Am. Cas. Co.*, 489 F.2d 1384, 1388 (7th Cir. 1973) (reversing a judgment for the defendant insurer, which presented substantial evidence in support of two independent defenses to liability, one of which was prohibited by state law). As a result, these decisions do not involve, and therefore do not mention, the harmless error exception. Tellingly, petitioners cannot point to a single decision that expressly *rejects* such an exception as impermissible under *Baldwin*.

Nor is application of a harmless error exception inconsistent with *Baldwin* or this Court's subsequent cases. This Court's early cases pre-date the emergence of harmless error as a generally accepted form of review, and thus do not consider the topic. However, this Court's decision in *Wilmington Star* specifically provides that reversal of a general verdict is appropriate only *"where it is impossible* from the record to say upon which of the counts of the declaration the verdict was based." 205 U.S. at 79 (emphasis added). As the First Circuit has noted, "[t]he harmless error approach addresses this concern by requiring reversal unless the reviewing court concludes that it is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.'" *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001) (quoting *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980)); *see also Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1998) ("It has long been acknowledged, however, that *Baldwin* does not speak to the harmless error situation.").

The only cases to which petitioners point that deviate from the well-established approach of applying the *Baldwin* rule in conjunction with some form of harmless error analysis, adopted by at least eight circuits, are a handful of mostly older Seventh Circuit cases that suggest that a general verdict should be sustained if there is adequate evidentiary support for any valid theory of liability considered by the jury. But a single court's aberrational deviations from a generally accepted approach to the application of this Court's precedents typically do not warrant this Court's review. This is particularly so when at least seven other circuits besides the Seventh Circuit have decided cases that set forth the established rule, no circuit has rejected that rule, and the decision below is entirely consistent with it. And this may explain why this Court has denied at least six requests to reexamine the application of *Baldwin*, even in cases where, unlike here, the *Baldwin* rule actually was implicated.[6]

And, in fact, even the Seventh Circuit's past departures from the *Baldwin* rule are blown out of all proportion by petitioners. The Seventh Circuit has repeatedly applied *Baldwin* in a manner consistent with the generally accepted approach. *See, e.g.*, *Lawndale Nat'l Bank*, 489 F.2d at 1388 (applying the general *Baldwin* rule); *Dawson v. N.Y. Life Ins. Co.*,

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[6] *See Regions Bank v. BMW N. Am., Inc.*, No. 05-375 (cert. denied Nov. 28, 2005); *Union Pac. R.R. Co. v. Barber*, No. 04-47 (cert. denied Oct. 12, 2004); *Mitsubishi Elec. Corp. v. Ampex Corp.*, No. 99-1287 (cert. denied Apr. 3, 2000); *Atl. City Police Dep't v. Hurley*, No. 99-431 (cert. denied Jan. 10, 2000); *Ernst & Young LLP v. Knapp*, No. 96-886 (cert. denied Feb. 18, 1997); *Transp. Ins. Brokers, Inc. v. D.W. Ferguson & Assocs.*, No. 94-2113 (cert. denied Oct. 2, 1995).

135 F.3d 1158 (7th Cir. 1998) (same); *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 597, 599 n.3 (7th Cir. 1985) (applying harmless error exception to *Baldwin* principle). The only remotely recent case on which petitioners rely—*Kossman v. Northeast Illinois Regional Commuter Railroad Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000)—implies that the defendant's failure to request a special verdict may be the cause of the alteration of the usual *Baldwin* rule. Indeed, the Ninth Circuit and Federal Circuit have expressly held that such conduct forfeits the right to complain of the opacity of a general verdict. *See McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989); *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300 (Fed. Cir. 1999). *Kossman* accordingly is not inconsistent with *Baldwin*, but instead offers yet another possible exception fully reconcilable with *Baldwin*, and because petitioners specifically agreed to the disjunctive jury instruction and the general verdict rendered here, this exception would be fatal to petitioners' argument as well (assuming that this case presented any legitimate *Baldwin* issue, which, as detailed above, it does not).

C. This Case Presents An Unusually Poor Vehicle For A Reexamination Of The *Baldwin* Principle

Finally, even assuming for the sake of argument that review were warranted in an appropriate case to consider the interpretation of *Baldwin*, this case is a particularly poor vehicle for that consideration.

1. Perhaps most notably, the court of appeals did not even explicitly address petitioners' argument, which, as noted *supra* at 9-13, was forfeited. This Court has observed that "prudence" counsels declining to "decid[e] in the first instance an issue on

which the trial and appellate courts did not focus," which may be better evaluated by the lower courts. *United States v. Bestfoods*, 524 U.S. 51, 71-72 (1998); *see also Lab. Corp. of Am. Holdings v. Metabolite Labs.*, 548 U.S. 124, 132-33 (2006) (Breyer, J., dissenting) (dissenting from the Court's dismissal of a writ of certiorari as improvidently granted, but noting in support of the majority decision the "practical reason" that the court below had "not directly consider[ed] the question" and that "[l]ower court consideration almost always helps" the Court "reach a better decision").

Even beyond the lack of a lower court opinion explicitly addressing the issue, however, this case would require extensive review of petitioners' sufficiency-of-the-evidence arguments before this Court could even begin to address any question regarding the interpretation of *Baldwin*. *Baldwin* and its progeny apply to a particular type of case: one in which a reviewing court finds error in one or more theories potentially supporting a general verdict. This is not such a case. Neither the district court in its ruling on Hendley's post-trial motion, nor the court of appeals, even implied—much less concluded—that error was present in *any* of respondent's three theories of liability. Instead, as noted above, the Seventh Circuit specifically acknowledged and affirmed the district court's finding that respondent "backed up [his] allegations with evidence at trial" and that he "submitted sufficient evidence at trial to allow the jury to find that Hendley *did not* provide truthful information to subsequent decision makers, and that he *did* mislead the official who could be expected to exercise independent judgment." Pet. App. 4, 6.

In order to reach the question of whether *Baldwin* nonetheless required relief in this case, this Court first would need to reexamine the trial evidence considered by the district court and the court of appeals to determine whether those courts erred in concluding that respondent presented sufficient evidence on each of his three due process theories. Given the generous interpretation that must be given to evidence in support of a jury verdict in deciding a sufficiency challenge, and the finding of the court of appeals that the evidence was sufficient, as well as the considerable deference due those determinations, there is virtually no possibility that this review of the record would ultimately result in a determination that this Court could reach the *Baldwin* question. Additionally, the Court would have to consider the substantial threshold question of whether and when statements made in a closing argument amount to independent bases of liability that, under petitioners' proposed expansion of *Baldwin*, must each be legally sound and supported by sufficient evidence. Unless the Court could surmount both of these threshold issues, its decision could consider only the factbound question of whether respondent here presented enough evidence to warrant a verdict in his favor, a question that would have no importance beyond the context of this case.

2. Even if this Court were to overcome these issues and reach the question of whether *Baldwin* was followed by the Seventh Circuit in this case, it is unlikely that any decision of this Court would result in a different ultimate outcome. As noted above, the courts of appeals generally agree that *Baldwin* challenges, like the vast majority of challenges to a judgment, are limited by harmless error review. If this Court adopted this approach, any lack of evi-

dence in support of one of the grounds for the general verdict would likely be found to be harmless error.

The courts of appeals are often able to uphold verdicts by resort to harmless error standards when the error involved is that a claim was submitted to the jury when supported by insufficient evidence. *See, e.g., Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 30 (1st Cir. 2004) ("Recognizing that a jury is likely to prefer a better supported theory to one less supported, we have generously applied the harmless error concept to rescue verdicts where we could be *reasonably sure* that the jury in fact relied upon a theory with adequate evidentiary support."); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (applying harmless error to uphold verdict where there was "little if any evidence" in support of one theory, rendering court "reasonably certain" that the jury did not base its verdict on that theory).

Here, both the district court and the Seventh Circuit concluded that the evidence was sufficient on each theory advanced by respondent. Even if this Court's review of this evidence somehow led it to disagree, the Court would be likely to determine that this error was harmless, given the substantial evidence on respondent's other theories. Indeed, petitioners did not even challenge the sufficiency of the evidence with respect to respondent's claim that Hendley orchestrated an unduly suggestive showup identification. In light of the substantial and unquestioned evidence on these theories of liability, this Court could comfortably conclude to a reasonable certainty that, if the evidence on certain *Brady* theories was insufficient to support a verdict, the jury relied on an appropriately supported theory.

In short, if the Court granted review of this case, it would be required to resolve substantial threshold, factbound issues, and then required to apply *Baldwin* without the benefit of a decision from any lower court on that issue. Moreover, the Court's decision would be unlikely to change the ultimate outcome of the case. These circumstances mark this case as a uniquely poor vehicle for consideration of any questions surrounding the proper interpretation of *Baldwin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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